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No. 06-873

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In The Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, and LORA SISSON, Individually and on behalf of a class,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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INTRODUCTION

Pursuant to Supreme Court Rule 15.8, the respondents submit this Supplemental Brief to correct several representations about the proceedings below that appear in the February 6, 2006 Reply Brief of Petitioner. Those proceedings are significant here because the Court considered the merits of Mohawk Industries Inc.'s RICO enterprise arguments last Term, only to dismiss certiorari as improvidently granted after learning that Mohawk had failed to preserve the "antecedent question" of whether a corporation can ever be a member of an association-in-fact enterprise pursuant to 18 U.S.C. § 1961(4). In its Reply, Mohawk parses the words of its lower court briefs, attempts to distinguish between "the issues" and "its arguments," and contends there is no waiver. It is for this Court to determine how Mohawk's repeated prior concessions that a corporation can be a member of an association-in-fact enterprise will affect this Petition. But the Court should make that determination based on a clear sense of what actually transpired below. And because Supreme Court Rule 15.2 requires respondents to point out any objections to "considering a question presented based on what occurred in the proceedings below," the plaintiffs submit this Supplemental Brief to clarify those proceedings in this case.

SUPPLEMENTAL REASONS FOR DENYING THE PETITION

Mohawk's second Question Presented asks the Court to grant certiorari to resolve an alleged circuit split over whether a corporation and its agents are sufficiently distinct to form a RICO enterprise. Mohawk further urges

the Court to address the "critical antecedent question" of whether a corporation may ever be a constituent part of an enterprise consisting of a "group of individuals associated in fact" pursuant to 18 U.S.C. § 1961(4).[1] But Mohawk waived that antecedent question when it informed both the district court and the Eleventh Circuit that Mohawk agreed corporations could form part of an association-in-fact enterprise.[2]

Although the Petition made no mention of this substantial obstacle to certiorari, Mohawk's Reply argues there is no waiver because Mohawk consistently has maintained that the plaintiffs failed to allege a proper RICO enterprise.[3] Even if Mohawk failed to make the argument for which it seeks certiorari, the Reply suggests that the arguments Mohawk did make nevertheless preserved any conceivable enterprise "issue."[4] Second, the Reply contends the entire inquiry is irrelevant because Mohawk did preserve the argument it now presses on appeal. Finally, the Reply argues that regardless of what Mohawk advocated to the lower courts, this Court should grant certiorari because the Eleventh Circuit "passed on" the question of whether corporations can be members of association-in-fact enterprises. As explained below, each of these arguments misstates the record.

1. The issue raised in Mohawk's motion to dismiss, on interlocutory appeal to the Eleventh Circuit and on

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[1] Reply Br. of Pet. at 5 (filed Feb. 6, 2007) ("Reply"); Pet. for a Writ of Certiorari at 20-21 (filed Dec. 19, 2006) ("Pet."). *See also* U.S. Chamber of Commerce *Amicus* Br. (filed Jan. 22, 2007).

[2] *See* Br. in Opp. to the Pet. at 9-12 (filed Jan. 22, 2007) ("Opp."); Resp. Br. at 12-14 (05-465, filed Mar. 16, 2006).

[3] *See* Reply at 5-9.

[4] *Id.* at 6.

certiorari to this Court last Term was whether the plaintiffs had alleged an enterprise distinct from Mohawk itself. In the lower courts, Mohawk offered two arguments to support that contention. First, Mohawk argued that the alleged enterprise of Mohawk plus third-party recruiters was no different than (or not separate from) Mohawk itself.[5] Mohawk also offered the related argument that its alleged participation in the affairs of this enterprise was no different than (or not separate from) conducting the affairs of Mohawk itself.[6] Mohawk's issue – and both its supporting arguments – therefore concerned the plaintiffs' purported failure to identify an enterprise separate from Mohawk. As this Court held in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 160-63 (2001), those "separateness" concerns are suggested by 18 U.S.C. § 1962(c), which requires the plaintiff to plead and prove the defendant's participation in the affairs of a RICO enterprise. Mohawk's briefs to the district court and the court of appeals echo that point by making repeated reference to § 1962(c).

The very different question that Mohawk seeks to inject into the case now is whether RICO's separate definitional statute, 18 U.S.C. § 1961(4), permits the inclusion of corporations in any association-in-fact enterprise. Section 1961(4) provides that a RICO enterprise "includes . . . any union or any group of individuals associated in fact," and as the Petition concedes, all the circuit

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[5] *See* Mohawk Dist. Ct. Motion to Dismiss at 10-12 (Dist. Ct. Dkt. No. 25, filed Feb. 9, 2004).

[6] *Id.* at 12-14. To the extent Mohawk preserved any other arguments they related to the sufficiency of plaintiffs' description of the enterprise and an alleged lack of common purpose. *Id.* at 13-15 & n.7.

courts agree that this definition is broad enough to encompass associations comprised of corporations and other legal entities.[7] After affirmatively representing to the district court and the court of appeals that Mohawk agreed with that well-settled interpretation of § 1961(4), Mohawk seeks to reverse course, and its Petition urges this Court to be the first to take up the § 1961(4) question in this case.

Although Mohawk concedes that its Petition presents two enterprise questions, the Reply conflates those questions without acknowledging that there are two entirely different statutory provisions at issue. That difference is important because *American National Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606 (1985), another RICO case, summarily rejected a similar attempt to pirouette from the RICO provision the petitioner had argued below to a different provision in the Supreme Court. In the court of appeals, the petitioner had argued that RICO's civil damage provision, 18 U.S.C. § 1964(c), required the plaintiff to plead an injury caused by the defendant's participation in the affairs of an enterprise, not just an injury caused by the predicate crimes. After winning certiorari to review this § 1964(c) question, the petitioner argued that the complaint did not properly allege the defendant's conduct of an enterprise's affairs in violation of § 1962. The Court noted that this separate question of statutory interpretation was not properly before the Court because the

[7] *See* Pet. at 20 (noting the "wide acceptance" of this interpretation of § 1961(4)).

petitioner had not made the argument below and the court of appeals had not passed on it.[8]

Mohawk's attempt to overhaul its prior § 1962(c) distinctness arguments to sweep up an entirely discrete § 1961(4) question is no different. And the cases Mohawk cites at pp. 6-7 of the Reply offer no support to the petitioner who seeks to reverse a defeat by raising an entirely new question about an entirely different statutory provision for the first time in this Court.[9] At bottom, Mohawk's contention that it preserved every conceivable enterprise argument by framing the "overarching issue of whether plaintiffs had plead a legally cognizable RICO enterprise"[10] is not much different than the untenable theory that a not guilty plea preserves all issues for Supreme Court review, regardless of the arguments the defendant chose to make to the lower courts.

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[8] *Id.* at 608. *See also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 456-57 (1995) (declining to address an argument premised on a statute the petitioner had failed to raise in the lower courts).

[9] Indeed, *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992), confirms that the Court will not consider a claim the petitioner failed to advance below. The argument the Court permitted had been raised (albeit ambiguously) and passed on below, but the Court excluded a substantive due process claim that was neither made nor ruled upon in the lower courts. *Id.* at 533-34. Moreover, in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001), the "reframe[d]" issue concerned coverage under the same statute and the Court noted that the importance of the question demanded an exception to the ordinary rule. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) is inapposite because, although the petitioner had waived the argument, the court of appeals had nevertheless ruled directly on the question. As noted below, the Eleventh Circuit did not similarly pass on the § 1961(4) question Mohawk advances here.

[10] Reply at 6.

2. In addition, the Reply Brief contends that Mohawk preserved the antecedent question "because Mohawk did explicitly raise the foreclosed § 1961(4) argument both before the panel and the entire Eleventh Circuit."[11] Although literally true, that description badly misrepresents the record. To the extent Mohawk raised this issue in *Williams I*, it was to affirmatively represent that corporations ***could be*** members of association-in-fact enterprises – a position that directly contradicts the argument for which it now seeks certiorari.[12] After this Court dismissed certiorari as improvidently granted in *Williams I* and remanded the case to the court of appeals last Term, the Eleventh Circuit limited any supplemental briefing to the proximate causation issues raised by this Court's decision in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006).[13] Accordingly, Mohawk made a single, passing reference to the § 1961(4) argument in the last footnote on the last page of its Supplemental Brief. That fleeting footnote represents Mohawk's only substantive attempt to argue that § 1961(4) precludes (rather than permits) association-in-fact enterprises comprised of corporations before the

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[11] *Id.*

[12] *See* Mohawk Dist. Ct. Reply Br. at 5 [Dist. Ct. Dkt. 43] ("Mohawk agrees that a corporation can be both a RICO person and part of an association-in-fact enterprise"); Opp. at 9-10 (collecting additional concessions). Those representations waive the § 1964(1) argument for purposes of this appeal, without regard to any separate argument over judicial estoppel. *See Steagald v. United States*, 451 U.S. 204, 208-09 (1981) (government forfeited its opportunity to contest the defendant's reasonable expectation of privacy by failing to make the argument below and by acquiescing the point in its brief in opposition to certiorari).

[13] *See* Order (11th Cir. July 27, 2006).

Eleventh Circuit rendered *Williams II*, the decision for which the Petition seeks this Court's review.

Mohawk argues that nothing further could have been expected because binding precedent in the Eleventh Circuit – and every other circuit – foreclosed the argument that a corporation could not be a member of an association-in-fact enterprise.[14] The Reply cites *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 770 (2007), for the proposition that Mohawk's tactics constituted "counsel's sound assessment that the [§ 1961(4)] argument would be futile" in light of binding precedent.[15] But *MedImmune* declined to find waiver where the petitioner had devoted "a few pages of its appellate brief" to the foreclosed argument before seeking certiorari.[16] Moreover, in *MedImmune* there was no indication that the petitioner had represented its agreement with the proposition of law that it later asked this Court to reverse. Accordingly, Mohawk's efforts to present its § 1961(4) argument to the Eleventh Circuit panel that decided both *Williams I* and *Williams II* does not meet the *MedImmune* standard. Only after the panel issued *Williams II*, rejecting Mohawk's *Anza* arguments, did Mohawk devote any substantive attention to the enterprise argument it now presses this Court to review.[17]

3. Finally, the Reply contends that regardless of what Mohawk presented to the lower courts, this Court should grant review because the Eleventh Circuit "passed

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[14] *See* Reply at 5-6.

[15] *Id.* at 6 n.5.

[16] *MedImmune*, 127 S. Ct. at 770.

[17] *See* Pet. App. 81a-84a.

upon" the § 1961(4) argument in *Williams II*.[18] Once again, that misstates the record because on remand from this Court, the Eleventh Circuit specifically limited its consideration and the *Williams II* decision to *Anza's* impact on the plaintiffs' proximate cause allegations. Indeed, the *Williams II* panel declined to reconsider any enterprise issue and simply reissued its prior enterprise analysis verbatim from *Williams I*.[19] Moreover, the citation to *United States v. Goldin Industries, Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000) at Pet. 7a-8a, on which Mohawk bases its claim, makes no mention of the corporation question Mohawk urges on the Court.[20] The different proposition for which the court of appeals cited *Goldin* constitutes nothing more than a "routine restatement and application of settled law by an appellate court," which does not satisfy this Court's "pressed or passed upon below" rule.[21] Nor did the full Eleventh Circuit "pass upon" Mohawk's § 1961(4) argument when it denied Mohawk's petitions for re-hearing without comment or dissent.[22]

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[18] Reply at 6 n.5 (citing Pet. App. 7a-8a).

[19] *Compare* Pet. 7a-12a *with Williams I*, 411 F.3d 1251, 1257-60 (11th Cir. 2005).

[20] *See* Pet. 7a-8a (citing *Goldin* for the proposition that an enterprise must have an "ongoing organization," "function as a continuing unit," and exist as an "association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes").

[21] *Illinois v. Gates*, 462 U.S. 213, 223 (1983) (without "any real contest" on the point, the routine application of prior precedent is not sufficient).

[22] *Cf. Yee*, 503 U.S. at 533 (denial of certiorari expresses no view on the merits and therefore does not satisfy the Court's requirement that a prior court pass upon the question); *City of Houston v. Hill*, 482 U.S. 451, 467 n.16 (1987) (abstention argument was significantly undercut because the petitioner had not raised it before the panel and the en banc court made no mention of the argument).

Mohawk's serial attempts to overcome the legal hurdles to reviewing the § 1961(4) question it conceded below are effectively answered by this Court's decision in *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001). There, the Court acknowledged that it has occasionally permitted a litigant to defend a lower court judgment on grounds different than those advocated below, but held that "it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it."[23] Because Mohawk's belated attempt to secure a dismissal based on § 1961(4) falls firmly into this latter category, the Court should decline Mohawk's invitation to review the question in this case.

CONCLUSION

The record below demonstrates that Mohawk's motion to dismiss attacked the plaintiffs' ability to satisfy 18 U.S.C. § 1962(c), not § 1961(4). In challenging the alleged enterprise, Mohawk did not press the separate § 1961(4) question that Mohawk now urges in the Petition. To the contrary, Mohawk affirmatively conceded that question by telling the lower courts that it agreed corporations could be part of an association-in-fact enterprise. As a result, neither the district court nor the court of appeals passed upon that question. Mohawk's varied attempts to avoid the consequences of its prior concessions cannot be reconciled

[23] 533 U.S. at 417.

with record in this case. Because this Court does not sit as a court of first instance and does not grant certiorari to review issues that the parties failed to press below, the Petition should be denied.

Respectfully submitted,

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